



PRESIDENT

John R. Tarpley
201 4th Ave N #1500
PO Box 198615
Nashville, Tennessee 37219
(615) 259-1366
FAX (615) 259-1369
Email: jtarpley@tkkwc.com

PRESIDENT-ELECT

Charles Swanson
616 W. Hill Avenue
Knoxville, Tennessee 37901-2149
865-548-3653
FAX 865-637-7300
E-mail: cswanson@shepsswan.com

VICE-PRESIDENT

Bill Haltom
One Commerce Square
29th Floor
Memphis, Tennessee 38103
(901) 577-6128
FAX (901) 525-6722
Email: haltomw@thomasonlaw.com

TREASURER

Paul Ney
222 4th Ave N
Nashville, Tennessee 37219
(615) 256-8585
(615) 256-7444
Email: poney@intlaw.net

SECRETARY

Bill Harbison
424 Church St., Suite 2000
Nashville, Tennessee 37219-3304
615-742-4200
FAX 615-742-4539
Email: bharbison@sherrardroe.com

IMMEDIATE PAST PRESIDENT

Albert C. Harvey, Memphis

BOARD OF GOVERNORS

Don Ash, Murfreesboro
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Jim Moore, Knoxville
Barbara Moss, Nashville
Linda Warren Seely, Jackson
Ed Stanton, Memphis
Bill Whitesell, Murfreesboro
Cindy Wyrick, Sevierville

GENERAL COUNSEL

Gail Vaughn Ashworth, Nashville

EXECUTIVE DIRECTOR

Alan F. Ramsaur, Nashville
Email: aramsaur@tnbar.org

January 23, 2004

The Honorable Cecil Crowson
Appellate Court Clerk
100 Supreme Court Building
Nashville, TN 37219-1407

IN RE: PROPOSED RULE 13 AMENDMENT
NO. M2003-02181-SC-RL2-RL

Dear Cecil:

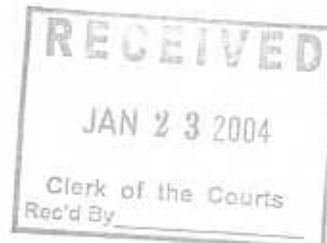
Attached please find an original and six copies of the Joint Comments on the Proposed Amendments to Rule 13.

Recent communications from your office request that the parties present a plan for oral argument. Those who have been involved in the joint effort to develop a comprehensive proposal believe that more than the usual one hour should be set for such arguments.

As a suggestion, may we propose the following:

Joint commentors presentation on their recommendations
-30 minutes.

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APPELLATE COURT CLERK
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Tennessee Bar Center
221 Fourth Avenue, North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

Pro/Con Argument with respect to contested case *lex parte* hearings on requests for investigative, expert and related services- 20 minutes each with representatives from the Tennessee Association of Criminal Defense Lawyers and the Tennessee District Attorneys General Conference taking the opposing positions.

Argument by the Tennessee District Public Defenders Conference- 20 minutes

Argument by any other parties from whom the Court wishes to hear-10 minutes each

Rebuttal/Closing

Tennessee District Attorneys General Conference-10 minutes

Joint Commentors -10 minutes

We will review this plan with you or a representative from the Court at your convenience.

As always, thank you for your cooperation. I remain,

Very truly yours,

A handwritten signature in black ink, appearing to read 'Allan F. Ramsaur', followed by a long horizontal flourish.

Allan F. Ramsaur
Executive Director

Copy to:

Chief Justice Frank Drowota, Tennessee Supreme Court
Connie Clark, Director, Administrative Office of the Courts
John R. Tarpley, President, Tennessee Bar Association
Gail Vaughn Ashworth, General Counsel
John Henderson, President, Tennessee District Public
Defenders Conference
Donald E. Dawson, Post-Conviction Defenders Office

Criminal Defense Lawyers
William Andy Hardin, Tennessee District Public
Defenders Conference
Jeffrey Henry, Tennessee District Public Defenders
Conference
Mark E. Stephens, Public Defender, Knox County
Jerry P. Black, Jr., Tennessee Association of Criminal
Defense Lawyers
Michael J. Passino, Tennessee Association of Criminal
Defense Lawyers
Rule 13 Group
David Bosch, Member, TBA Criminal Justice Section
Bill Cox, Tennessee District Attorney General's Conference
Susan Kay, Vanderbilt University Legal Clinic
James Wallace Kirby, Tennessee District Attorney General's
Conference
William Ramsey, Tennessee District Attorney General's
Conference
Carl Seely, Vice-Chair, Juvenile and Children's Law Section
John Williams, Tennessee District Attorney General's
Conference
Service List {State and local bars and bar related groups }

Gail Vaughn Ashworth
Gideon & Wiseman PLC
200 4th Ave N 1100 Noel Place
Nashville, TN 37219

William Glyn Ramsey
30th Jud. Dist. DA Office
201 Poplar Ave Ste LL26
Memphis, TN 38103

Jerry Pinckney Black Jr
UT Law School
1505 W Cumberland Ave
Knoxville, TN 37996

Carl Edward Seely
231 Oil Well Rd., Suite B
Jackson, TN 38305

William H Cox III
11th Jud. District Attorney Office
600 Market St Ste 310
Chattanooga, TN 37402

Mark E Stephens
6th Jud. Dist. Pub. Def. Office
1101 Liberty St
Knoxville, TN 37919

Frank F Drowota III
TN Supreme Court
Supreme Court Bldg
401 7th Ave N Ste 318
Nashville, TN 37219

John Roy Tarpley
Lewis King Krieg & Waldrop
201 4th Ave. N #1500
PO Box 198815
Nashville, TN 37219

William Andy Hardin
Dist. Public Defenders Conference
211 7th Ave N Ste 320
Nashville, TN 37243

John Oswill Williams
Office of District Attorney
93 N. Ocoee Street
PO Box 1351
Cleveland, TN 37364

John Hughes Henderson Jr
21st Jud. Dist. Pub. Def. Office
PO Box 68
Franklin, TN 37065

Jeffrey Shaw Henry
Tennessee District Public Defenders
Conference
211 7th Ave N Ste 320
Nashville, TN 37219

Susan Laurie Kay
Vanderbilt University Legal Clinic
Vanderbilt University
Nashville, TN 37240

James Wallace Kirby
Executive Director District Attorney
105 Sycamore St
Ashland City, TN 37015

Michael James Passino
Law Office of Micheal J. Passino
323 Union St
Nashville, TN 37201

Russell W. Adkins, President
Kingsport Bar Association
P. O. Box 1007
Kingsport, TN 37662-1007

Elizabeth C. Asbury, President
Campbell County Bar Association
P. O. Box 66
Jacksboro, TN 37757-0066

Kyle C. Atkins, President
Gibson County Bar Association
P. O. Box 160
Humbolt, TN 38343-0160

Renfro Blackburn Baird III, President
Hawkins County Bar Association
211 S. Depot St.
Rogersville, TN 37857

B. Diane Biddle, Secretary
Morgan County Bar Association
P. O. Box 405
Wartburg, TN 37887-0405

Mark E. Blakley, President
Scott County Bar Association
P. O. Box 8
Huntsville, TN 37756

Charles Ronald Blanton, President
Sumner County Bar Association
113 West Main Street
Gallatin, TN 37066

George Benson (Ben) Boston, President
Lawrence County Bar Association
P. O. Box 357
Lawrenceburg, TN 38464-0357

Randal R. Boston, President
Cumberland County Bar Association
P. O. Box 2721

Crossville, TN 38557-2721

Dan T. Bryant, President
Warren County Bar Association
118 N. College St.
McMinnville, TN 37110

Eric J. Burch, President
Coffee County Bar Association
200 S. Woodland St.
Manchester, TN 37355

William J. Cockett, President
Johnson County Bar Association
P. O. Box 108
Mountain City, TN 37683-0108

Daryl Anthony Colson, President
Overton County Bar Association
211 N. Church St.
Livingston, TN 38570

Bratton Hale Cook, II, President
DeKalb County
Bar Association
104 N. Third St.
Smithville, TN 37166

Jerred Allen Creasy, President
Dickson County Bar Association
P. O. Box 500
Charlotte, TN 37036

Creed A. Daniel, President
Grainger County Bar Association Bar
Association
P. O. Box 6
Rutledge, TN 37861-0006

Thomas A. (Drew) Davidson, President
Marshall County Bar Association
107 W. Commerce St. Ste.C
Lewisburg, TN 37091

Joy L. Davis, President
Williamson County Bar Association
P. O. Box 664
Franklin, TN 37065

Dean P. Dedmon, President
Dyer County Bar Association
P. O. Box 763
Dyersburg, TN 38025-0763

Harry M. Denton, President
Hardeman County Bar Association
P. O. Box 306
Bolivar, TN 38008-0306

John Reed Dixon, President
Monroe County Bar Association
P. O. Box 111
Sweetwater, TN 37874-0111

William D. Douglas, Jr., President
Lauderdale County Bar Association
109 N. Main St.
P. O. Box 489
Ripley, TN 38063-0489

Gayden Drew IV, President
Jackson-Madison-Henderson County Bar
Association
174 W. University Parkway
Jackson, TN 38305

John F. Dugger, Jr., President
Hamblen County Bar Association
P. O. Box 1733
Morristown, TN 37816-1733

James Bruce Dunn, President
Cocke County Bar Association
339-A E Main St.
Newport, TN 37821

Charlotte Ann Ulintz Fleming, President
Robertson County Bar Association
607 Locust Street
Springfield, TN 37172

Patrick A.
Flynn, President
Maury County Bar Association
P. O. Box 90

Columbia, TN 38402-0832

Joseph E. Ford, President
Franklin County Bar Association
17 S. College
Winchester, TN 37398

M. Shannon Littleton, President
Loudon County Bar Association
P. O. Box 449
Lenoir City, TN 37771

Tim Naifeh, President
Lake County Bar Association
227 Church St.
Tiptonville, TN 38079-1109

Andrew B. Frazier, Jr., President
Benton County Bar Association
P. O. Box 208
Camden, TN 38320-0208

Sally C. Love, President
Bradley County Bar Association
P. O. Box 42
Cleveland, TN 37364-0042

James Stephen Pate, President
Unicoi County Bar Association
P. O. Box 57
Erwin, TN 37650

Judith A.
Hamilton, President
McMinn-Meigs County Bar Association
P. O. Box 1333
Athens, TN 37371-1333

Jack D. Lowery, President
Fifteenth Judicial District Bar Association
150 Public Square
Lebanon, TN 37087

Keith R. Peterson, President
Giles County Bar Association
P. O. Box 1057
Pulaski, TN 38478

W. Brown Hawley, II, President
Paris-Henry County Bar Association
308 W. Washington St.
P. O. Box 459
Paris, TN 38242-0459

Matt Maddox, President
Carroll County Bar Association
P. O. Box 827
Huntingdon, TN 38344

Nikki Carter Pierce, President
Greene County Bar Association
Federal Defenders Services of Eastern TN
100 W. Summer St.
Greeneville, TN 37743

M. Kevin Heffelman, President
Cheatham County Bar Association
112 S. Main
Ashland City, TN 37015

Susan Melton, President
Rutherford-Cannon County Bar Association
P. O. Box 446
Woodbury, TN 37190-0446

Eric Reeher, President
Bristol Bar Association
P. O. Box 8400
Bristol, VA 24203-8400

Mike A. Hickman, President
Blount County Bar Association
213 Ellis Avenue
Maryville, TN 37804-5910

Eric D. Miller, President
Washington County Bar Association
P. O. Box 360
Johnson City, TN 37605-0360

James R. Scroggins, President
Jefferson County Bar Association
P. O. Box 701
Jefferson City, TN 37760-0448

C. Thomas Hooper III, President
Haywood County Bar Association
10 S. Court Square
P. O. Box 55
Brownsville, TN 38012-0055

William D. Mitchell, President
White County Bar Association
112 S. Main
Sparta, TN 38583

Randall E. Self, President
Lincoln County Bar Association
131A East Market
P. O. Box 501
Fayetteville, TN 37334

James A. Hopper, President
Hardin County Bar Association
P. O. Box 220
Savannah, TN 38372

Kirk Moore, President
Obion County Bar Association
Box 250
Union City, TN 38281-0250

Regina Shepherd, President
Carter County Bar Association
116 S. Main St.

Elizabethton, TN 37643

Leslie Richard
Hunt, President
Anderson County Bar Association
139 N. Main Street
Clinton, TN 37716

K. David Myers, President
Union County Bar Association
P. O. Box 13
Union, TN 37807-0013

William R. Stanifer, President
Claiborne County Bar Association
1735 Main St.
P. O. Box 203
Tazwell, TN 37879-0203

Jeff Stimpson, President
Tipton County Bar Association
P. O. Drawer H
Munford, TN 38058

John Lee Williams, President
Humphreys County Bar Association
102 S. Court Square
Waverly, TN 37185-2113

Russell Anne Swafford, President
Twelfth Judicial District Bar Association
P. O. Box 758
Dunlap, TN 37327

Jonathan Lee Young, President
Putnam County Bar Association
100 S. Jefferson Avenue
Cookeville, TN 38501

James Michael Taylor (District Atty. General),
President
Rhea County Bar Association
Rhea County Courthouse Annex
375 Church St. Ste. 300
Dayton, TN 37321

Billy Townsend, President
Decatur, Hickman, Lewis,
Perry, Wayne Counties Bar Association
P. O. Box 340
Hohenwald, TN 38462-0340

Langdon S. Unger, President
Weakley County Bar Association
P.O. Box 1022
Martin, TN 38237-1023

Jonathan Vinson, President
Montgomery County Bar Association
322 Main St.
Clarksville, TN 37040

Richard T. Wallace, President
Sevier County Bar Association
111 Commerce St.
Sevierville, TN 37862

John R. White, President
Bedford County Bar Association
P. O. Box 169
Shelbyville, TN 37162-0169

Jeffery H. Wicks, President
Roane County Bar Association
924 N. Kentucky Street
Kingston, TN 37763

Barri Bernstein, Executive Director
Tn Bar Foundation
618 Church St.
Ste 120
Nashville TN 37219

Jimmy W. Bilbo, President
Tennessee Trial Lawyers Association
P. O. Box 191
Cleveland TN 37364-0191

Lance Bracey, Chief Counsel
Board of Professional Responsibility
1101 Kermit Drive
Ste 730
Nashville TN 37217

Beth Brooks, President
East Shelby County Bar Association
P. O. Box 11894
Memphis TN 38111-0894

Alan L. Cates, President
Chattanooga Bar Association
736 Market St. Ste. 1100
Chattanooga TN 37402

Cornelia A. Clark, Administrative Director
Administrative Office of the Courts
600 Nashville City Center
511 Union Street
Nashville TN 37219

Jim Deming, Executive Director
TALS
1808 West End Avenue Suite 1216
Nashville TN 37203

Steven A. Dix, President
TN Defense Lawyers Association
201 E. Main St. Ste. 415
Murfreesboro TN 38130

Jackie Dixon, President
Lawyers Association for Women
424 Church St. Suite 2210
Nashville TN 37219

Anne Fritz, Executive Director
Memphis Bar Association
One Commerce Square Ste. 1050
Memphis TN 38103

Thomas C. Galligan, Jr., Dean
University of Tennessee College of Law
1505 W. Cumberland Ave
Knoxville TN 37996-1810

Melanie Gober Grand, Executive Director
Lawyers Association for Women
P. O. Box 190583
Nashville TN 37219-0583

James Michael Haynes, Jr., President
Knoxville Bar Association President
P. O. Box 869
Knoxville TN 37901-0869

John James Hefflin III, President
Memphis Bar Association
5400 Poplar Avenue Ste. 100
Memphis TN 38119

Lynda M. Hood, Executive Director
Chattanooga Bar Association
Pioneer Building Suite 420
801 Broad St.
801 Broad Street
Chattanooga TN 37402

Monika Johnson, President
Ben Jones Chapter, NBA
P. O. Box 280692
Memphis TN 38168

Suzanne Keith, Executive Director
Tennessee Trial Lawyers Association
1903 Division Street
Nashville TN 37203-2705

Nicole Keller, Executive Director
TN Lawyers Association for Women
P. O. Box 331214
Nashville TN 37203

Joe C. Loser, Jr., Dean
Nashville School of Law
2934 Sidco Dr.
Nashville TN 37204-3712

Paul J.
Morrow, President
TN Association of Criminal Defense Lawyers
530 Church Street Suite 600
Nashville TN 37243

Marsha S. Pace, Executive Director
Knoxville Bar
406 Union Ave. Ste. 510
P.O. Box 2027
Knoxville TN 37901-2027

Donald J. Polden, Dean
University of Memphis School of Law
3715 Central Ave
Memphis TN 38152

A. Gregory Ramos, President
Nashville Bar Association
414 Union Ste. 1850
Nashville TN 37219

Mario Ramos, Secretary
TN Association of Spanish
Speaking Attorneys
611 Commerce St. Ste. 3119
Nashville TN 37203

Allan F. Ramsaur, Executive Director
Tennessee Bar Association
221 Fourth Ave. N. Ste. 400
Nashville TN 37219-2198

M. Todd Sandahl, President
Federal Bar Assoc.-Nashville Chapter
238 Public Square
Franklin TN 37064

David N. Shearon, Executive Director
Tennessee Commission CLE
221 Fourth Avenue North
Third Floor
Nashville TN 37219

Barbara Short, Executive Director
TN Association of Criminal Defense Lawyers
810 Broadway Suite 501
Nashville TN 37203-3810

Susan W. Sowards, Executive Director
Nashville Bar Association
315 Union St. #800
Nashville TN 37201-1401

Jill M. Steinberg, Chair
Tn Commission CLE
165 Madison Ave. 20th Floor
First Tennessee Bldg.
Memphis TN 38103

Kent Syverud, Dean
Vanderbilt University School of Law
131 21st Avenue So
Nashville TN 37240

N. Sue Van Sant Palmer, President
TN Lawyers Assoc. for Women
424 Church St. Ste. 1800
SunTrust Center
Nashville TN 37219

Luther Wright, Jr., President
Napier-Looby Bar
Boult Cummings Conners & Berry PLC
P. O. Box 198062
Nashville TN 37219-8062

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:

PROPOSED AMENDMENTS
TO TENN.S.CT.R. 13

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)
)
)

M2003-02181-SC-RLS-RL

**JOINT COMMENTS ON THE PROPOSED AMENDMENTS TO TENN.S.CT.R. 13
BY THE TENNESSEE BAR ASSOCIATION,
THE TENNESSEE PUBLIC DEFENDERS CONFERENCE,
THE TENNESSEE POST-CONVICTION DEFENDER, AND
THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

I. INTRODUCTION

On November 3, 2003, the Tennessee Bar Association, the Tennessee District Attorneys General Conference, the Tennessee Public Defenders Conference, the Tennessee Post-Conviction Defender, and the Tennessee Association of Criminal Defense Lawyers ("Joint Commentors") filed a joint motion to extend the period for commenting on the proposed amendments to Tenn.S.Ct.R. 13. The purposes of this request were to enable discussions among representatives of the moving entities and to further investigation, as detailed in the motion. Joint commentors' aim was to prepare and submit joint comments as to the ways in which the proposed rule could better address not only the just, speedy and economical disposition of criminal actions and post-conviction proceedings but also the provision of counsel and services to indigent persons in other proceedings described in the proposed rule.

On November 13, 2003, the Court extended the comment period and directed the joint commentors to consider particularly and comment on: (1) the compensation of guardians ad litem and attorneys in dependency and neglect cases; (2) the feasibility and desirability of restructuring the indigent defense system so that requests for services are decided by a central administrative entity rather than by trial courts; and (3) the proposed fee schedule and monetary caps for investigators, experts, and interpreters.

Representatives from the present groups and representatives of the District Attorneys General Conference met on five separate occasions. The careful, professional devotion of all involved has been noted in more than one instance. The group also held an extended, three hour meeting with representatives of the Administrative Office of the Courts and Lisa Rippy on behalf of the Chief Justice. The insight which they provided to the group was invaluable. Regrettably, the District Attorney's General Conference ultimately decided that they could not join in the final work product of the group. Several of the suggestions from the District Attorneys General Conference are incorporated into the proposals. The present groups express their appreciation for the professional demeanor and cooperative attitude of the District Attorneys' representatives.

II. THE COURT SHOULD ESTABLISH AN INDEPENDENT BODY WITHIN THE JUDICIAL DEPARTMENT TO ADMINISTER REPRESENTATION AND OTHER SERVICES FOR THE INDIGENT PARTIES.

The joint commentors strongly believe that establishing a centralized administrative agency is crucial to the proper final resolution of many concerns raised by, and presumably animating, the proposed Rule 13. Review of the ABA standards and guidelines, studies of Tennessee's indigent defense system, information from other states, and discussions about problems and abuses of the present system all have indicated that the economical and efficient

resolution of these problems demand the creation of a centralized agency charged not only with the promulgation of meaningful standards but also with the efficient and economical management and supervision of those standards.

Although the relatively recent enactment of the District Public Defender system and the Tennessee District Public Defenders Conference has gone a very long way toward improving indigent representation in Tennessee, significant issues relating to the administration and operation of the complex and ever-growing system of indigent representation are not within the power of the Conference to address or resolve. The independent body approach, if adopted by the Court, would satisfy this long overdue, and much needed supplement; provide the foundation for principled, incremental improvements in the system; offer a mechanism for providing substantial savings, which is not to say limiting what appears to be unavoidable growth; and relieve the courts, not only of the burden of administering the system on a day-to-day basis but eliminate the dual roles of administering and enforcing the administration of the system by the courts.

The first proposal annexed hereto as Exhibit A outlines the creation of Tennessee Indigent Representation Services (TIRS), an independent agency within the Supreme Court to administer indigent representation services. Joint commentators strongly believe that TIRS is the more workable of the two proposals. The adoption of the proposed rule at Exhibit A creating TIRS would permit the active management of a true system rather than the fragmented, rules-based, reactive scheme in place now. Creating TIRS would substantially enhance the administration of and further promote the economic and efficient delivery of indigent services in Tennessee.

TIRS would completely remove any appearance of conflict between the courts role as administrator, on the one hand, and their role as the final adjudicator of closely related legal claims and issues, on the other. TIRS would also, among other things, (1) develop uniform, state-wide standards for the appointment, performance, and compensation of counsel and service providers; (2) prescribe, administer, and monitor uniform, cost-effective procedures and rates for state-wide support services; and (3) relieve the Court of the day-to-day oversight of these matters.

III. IF THE COURT CHOOSES NOT TO ESTABLISH THE OFFICE OF TENNESSEE INDIGENT REPRESENTATION SERVICES AT THIS TIME, THE COURT SHOULD ADOPT SUBSTANTIAL AMENDMENTS TO PROPOSED RULE 13.

The present rule and the rule proposed by the Court in September each provide a framework for dealing with indigent representation and related services. This framework administered by the trial courts, this Court and the Administrative Office of the Courts is a rules-based, locally administered, ad hoc non-system for administration of indigent defense services. The joint commentators reiterate that they believe the far preferable system is one which brings active standards-based management and resources to the problems presented. However, should the court decide to stay with the present system, the groups' jointly recommend several changes, represented in the attached Exhibit B draft of the proposed rule. The highlights of the changes we recommend, in order of inclusion in the draft, include:

- Explicit provisions for the appointment and compensation for experts, investigators and other support services in parental rights termination proceedings, dependent and neglect proceedings and delinquency proceedings.
- Clarifying that the determination of indigence for a juvenile must be made independently of the parents' willingness to ask for representation for their child.
- Inclusion of standards established under the Tennessee Rules of Professional Conduct for conflicts of interest and withdrawal.
- Establishment of a single hourly rate for all compensation.

- Inclusion of a different cap for post- dispositional dependency and neglect and parental rights termination cases.
- Inclusion of skills oriented standards for counsel in capital cases.
- Establishment of a flat rate overhead for lawyers to be paid in lieu of detailed telephone, research and copying expense record- keeping and auditing.
- Re-establishment of a review mechanism for decisions of the director of the Administrative Office of the Courts.

A few of these changes require some additional explanation. The joint commentators fervently believe the present rates of compensation and caps on compensation place an extreme financial burden on the lawyer who wishes to do a competent, thorough job in representing an indigent party. See TRPC 6.2. With the different rates of compensation for in court and out of court time, the rule diminishes the investigation and preparation that effective counsel should do. The different compensation rates, rather emphasize and encourage “seat of the pants” in-court behavior.

Because the rate of compensation is so low, a lawyer in a fully- staffed and effectively run law office could spend all of the money received from representing an indigent party on staff, office equipment and library and research capabilities. We believe that offering an hourly overhead rate and eliminating the detailed record- keeping required for long distance telephone, research, local travel and the like will be a step in the right direction.

IV. THE COURT SHOULD REQUIRE PROCEDURES THAT PERMIT DEFENSE COUNSEL, WITHOUT CONSULTATION, NOTICE AND PARTICIPATION OF THE PROSECUTOR, TO REQUEST AND OBTAIN NECESSARY EXPERT, INVESTIGATIVE AND RELATED SERVICES AND TO BE REIMBURSED FOR THOSE SERVICES.

Among the most fundamental duties of a lawyer to a client are loyalty, independence of professional judgement, confidentiality and competency. Counsel for an indigent party who seeks to have services provided should not have to compromise loyalty, independence and confidentiality to fulfill that duty. In order to maintain confidentiality, independence of judgement and loyalty, counsel must be permitted to seek necessary expert, investigative, and related services without the intervention of another party in the matter, namely the state. TRPC 1.7[14] and TRPC 1.8(f).

The proposed rule has attempted to parse those areas in which ex parte hearings on request for services have been held to be constitutionally required. We recommend that the issue be resolved in all cases by a blanket rule.

This issue generated the clearest and cleanest line of departure with the District Attorneys General Conference. The District Attorneys believe hearings on these matters should be open and the state should be able to contest such requests.

V. THE RATES OF COMPENSATION AND EXPENSES FOR THOSE APPOINTED TO PROVIDE SERVICES TO INDIGENT PARTIES SHOULD BE ADEQUATE TO ALLOW THE INDIGENT PERSON TO OBTAIN NECESSARY SERVICES.

Many of the comments filed by others in the comment process have focused on the question of rates and other allowances for experts and investigators. The joint commentators have

little more than an anecdotal basis on which to determine the adequacy of such compensation. It is also quite difficult for the lawyers, who are the lowest paid out of any of the experts in the proposed system to make a recommendation with respect to increased rates.

One of the strongest motivations of the establishment of Tennessee Indigent Representation Services is the joint commentors' belief that the Office of Tennessee Indigent Representation Services, with its mandate to actively manage the system, can perform the necessary studies and reviews to determine levels of compensation which are necessary to provide adequate services. It is contemplated for example, that defense counsel who needs a DNA expert might call the office to inquire about the availability and possible cost of such an expert in her geographic area. This kind of active front-end involvement may yield great benefits.

IV. CONCLUSION

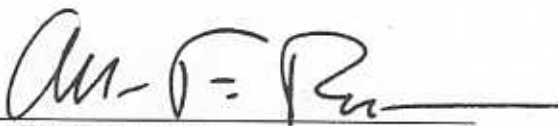
The joint commentors have invested more than 450 hours in reviewing, drafting, and refining proposals. The commentors humbly believe that "TIRS" is both highly desirable and feasible. If the Court is not yet ready to establish this independent body within the Judicial Branch, substantial improvements in Rule 13 can and should be made.

Respectfully Submitted,

Tennessee Bar Association

By: /S/ John R. Tarpley by permission
John R. Tarpley
Tenn. B.P.R. # 9661
President
Tennessee Bar Association
Lewis, King, Krieg & Waldrop
201 4th Avenue North, Suite 1500
Nashville, TN 37219
615.383.7421

By: /S/ Gail Vaughn Ashworth by permission
Gail Vaughn Ashworth
Tenn. B.P.R. # 10656
General Counsel
Tennessee Bar Association
Gideon & Wiseman, PLC
200 4th Avenue North, Suite 1100
Nashville, Tennessee 37219

By: 
Allan F. Ramsaur
Tenn.B.P. R #5764
Executive Director
Tennessee Bar Association
221 4th Avenue North, Suite 400
Nashville, Tennessee 37219-2198
615.383.7421

Tennessee Public Defenders Conference

By: /S/ William Andy Hardin by permission
William Andy Hardin
Tenn.B.P.R. # 14113
Executive Director
Tennessee Public Defenders Conference
211 7th Avenue North, Suite 320
Nashville, Tennessee 37219-1821
615.741.5562

Tennessee Post-Conviction Defender

By: /S/ Donald E. Dawson by permission
Donald E. Dawson

Tenn.B.P.R. # 10723
Post-Conviction Defender
Office of Post-Conviction Defender
530 Church Street, Suite 600
Cornerstone Building
Nashville, Tennessee 37243
615.741.9385

Tennessee Association of Criminal Defense Lawyers

By:

/S/ Paul J. Morrow by permission
Paul J. Morrow, Jr.
Tenn.B.P.R. # 5559
President and Deputy Post-Conviction Defender
Office of Post-Conviction Defender
530 Church Street, Suite 600
Cornerstone Building
Nashville, Tennessee 37243
615.741.9385

By: /S/ Mark E. Stephens by permission
Mark E. Stephens
Tenn.B.P.R. # 7151
6th Judicial District Public Defender
6th Judicial District Public Defender Office
1209 Euclid Avenue
Knoxville, Tennessee 37921
865.594.6120

By: /S/ Jerry P. Black, Jr. by permission
Jerry P. Black, Jr.
Tenn.B.P.R. # 2069
Associate Professor
University of Tennessee College of Law
1505 W. Cumberland Avenue
Knoxville, Tennessee 37966-1805
865.974.2331

By: /S/ Michael J. Passino by permission
Michael J. Passino
Tenn.B.P.R. # 5725
323 Union Street
Nashville, Tennessee 37201
615.255.8764

Certificate of Service

I hereby certify that a true and exact copy of the foregoing Comment and all annexed Exhibits has been served on the attached list by placing a copy in the United States Mail, postage prepaid, this 23rd day of January, 2004

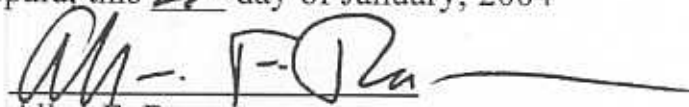

Allan F. Ramsaur.
Executive Director

EXHIBIT A
Rule 13- Tennessee Indigent Representation Services

§ 1. Title.

This Rule shall be known and may be cited as the
"Tennessee Indigent Representation Services" Rule.

§ 2. Purpose.

Whenever a person is determined to be indigent and entitled to counsel, it is the responsibility of the State under the federal and state constitutions to provide that person with counsel and the other necessary expenses of representation. The purpose of this Rule is to:

- (1) Enhance oversight of the delivery of counsel and related services provided at State expense;
- (2) Improve the quality of representation and ensure the independence of counsel;
- (3) Establish uniform policies and procedures for the delivery of services;
- (4) Generate reliable statistical information in order to evaluate the services provided and funds expended; and
- (5) Deliver services in the most efficient and cost-effective manner without sacrificing quality representation.

§ 3. Office of Tennessee Indigent Representation Services.

(a) The Office of Tennessee Indigent Representation Services, which is administered by the Director of Tennessee Indigent Representation Services and includes the Commission on Tennessee Indigent Representation Services, is created within the Judicial Department. As used in this Rule, "Office" means the Office of Tennessee Indigent Representation Services, "Director" means the Director of Tennessee Indigent Representation Services, and "Commission" means the Commission on Tennessee Indigent Representation Services. "Public Defender" means a district public defender, the state post conviction defender or the public defender selected in Metropolitan Nashville and Davidson County or Shelby County. "Appointed

counsel” means an attorney other than a public defender appointed to represent an indigent party under this rule.

(b) The Office shall exercise its prescribed powers independently of the director of the Administrative Office of the Courts. The Office shall have all powers necessary and proper to fulfill its duties under this Rule including, but not limited to, entering into contracts, owning property, and accepting funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The director of the Administrative Office of the Courts shall provide general administrative support to the Office. The term "general administrative support" includes purchasing, payroll, and similar administrative services.

(d) The budget of the Office shall be a part of the Judicial Department's budget. The Commission shall consult with the director of the Administrative Office of the Courts, who shall assist the Commission in preparing and presenting to the General Assembly the Office's budget, but the Commission shall have the final authority with respect to preparation of the Office's budget and with respect to representation of matters pertaining to the Office before the General Assembly.

(e) The director of the Administrative Office of the Courts shall not reduce or modify the budget of the Office or use funds appropriated to the Office without the approval of the Commission.

§ 4. Responsibilities of Office of Tennessee Indigent Representation Services.

(a) The Office shall be responsible for establishing, supervising, and maintaining a system for providing legal representation by appointed counsel and related services for all indigent parties in the following cases:

(1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;

(2) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;

- (3) Contempt of court proceedings in which the party is in jeopardy of incarceration;
- (4) Proceedings initiated by a petition for *habeas corpus*, early release from incarceration, suspended sentence, or probation revocation;
- (5) Proceedings initiated by a petition for post-conviction relief;
- (6) Parole revocation proceedings pursuant to the authority of state and/or federal law;
- (7) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
- (8) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34; and
- (9) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors;
- (10) Cases in which a juvenile is charged with juvenile delinquency for committing an act which would be a misdemeanor or a felony if committed by an adult;
- (11) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;
- (12) Guardian Ad Litem for the child in cases of reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411.
- (13) Guardian Ad Litem for the child in proceedings to terminate parental rights.
- (14) Cases in which a juvenile is charged in court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a).
- (15) Any other case in which an indigent person is entitled to legal representation under the laws of this state or the federal or state constitution.

(b) The Office shall develop policies and procedures for determining indigence in cases subject to this Rule, and those policies shall be applied uniformly throughout the State. The court shall determine in each case whether a person is indigent and entitled to legal representation, and counsel shall be appointed.

(c) In all cases subject to this Rule, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office.

(d) The Office shall allocate and disburse funds appropriated for legal representation by appointed counsel and related services for all indigent parties in cases subject to this Rule under rules and procedures established by the Office.

§ 5. Establishment of Tennessee Commission on Indigent Representation Services.

The Commission on Tennessee Indigent Representation Services is created within the Office of Indigent Representation Services and shall consist of 9 members. To create an effective working group, assure continuity, and achieve staggered terms, the Commission shall be appointed as provided in this section.

(a) The members of the Commission shall be appointed as follows:

(1) The Chief Justice of the Tennessee Supreme Court shall appoint one member, who shall be an active or former member of the Tennessee judiciary.

(2) The Chief Justice shall appoint one member upon the recommendation of the Speaker of the Senate.

(3) The Chief Justice shall appoint one member upon the recommendation of the Speaker of the House of Representatives.

(4) The Tennessee District Public Defenders Conference shall appoint one member.

(5) The Post Conviction Defender Commission shall appoint one member.

(6) The Tennessee Bar Association shall appoint one member.

(7) The Tennessee Association of Criminal Defense Lawyers shall appoint one member.

(8) The Tennessee Lawyers Association for Women shall appoint one member.

(9) The Tennessee Association of Black Lawyers, or by mutual agreement, the Ben Jones and the Napier-Looby chapters of the National Bar Association shall jointly appoint one member.

(b) The terms of members appointed under subsection (a) of this section shall be as follows:

The initial appointments of the Chief Justice shall be for (3) three years. The initial appointments of the Tennessee Bar Association, the Tennessee District Public Defender's Conference and the Post Conviction Defender Commission shall be for (2) two years. The initial appointments of the Tennessee Association of Criminal Defense Lawyers, Tennessee Lawyers Association of Women and Tennessee Association of Black Lawyers (or the person appointed under Section (a)(9)) shall be for one (1) year.

At the expiration of these initial terms, appointments shall be for three (3) years and shall be made by the appointing authorities designated in subsection (a) of this section. No person shall serve more than two consecutive three-year terms plus any initial term of less than three years.

(c) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Rule or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, employees of the District Attorney General's Conference, Attorney General and Reporter or Administrative Office of the Courts, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (a)(1) of this section. No employees of the Office of the Executive Director of the Tennessee District Public Defenders Conference, Post Conviction Defenders Office, or other active employees of the Office of Indigent Representation Services may be appointed to or serve on the

Commission. In making appointments the appointing authority shall do so with the conscious intention of selecting a body which reflects a diverse mixture with regard to geography, race, and gender.

(d) All members of the Commission are entitled to vote on any matters coming before the Commission unless otherwise provided by rules adopted by the Commission concerning voting on matters in which a member has, or appears to have, a financial or other personal interest.

(e) Each member of the Commission shall serve until a successor in office has been appointed. Vacancies shall be filled by appointment by the appointing authority for the unexpired term. Removal of Commission members shall be in accordance with policies and procedures adopted by the Commission.

(f) A quorum for purposes of conducting Commission business shall be a majority of the members of the Commission.

(g) The Commission shall elect a Commission chair from the members of the Commission for a term of two years.

(h) The Director shall attend all Commission meetings except those relating to removal or reappointment of the Director or allegations of misconduct by the Director. The Director shall not vote on any matter decided by the Commission.

(i) Commission members shall not receive compensation but are entitled to reimbursement in accordance with the comprehensive travel regulations.

§ 6. Responsibilities of Commission.

(a) The Commission shall have as its principal purpose the development and improvement of programs by which the Office of Tennessee Indigent Representation Services provides legal representation and related services to indigent persons.

(b) The Commission shall appoint the Director who shall be chosen on the basis of training, experience, and other qualifications. The Commission shall consult with the Chief Justice and Director of the Administrative Office of

the Courts in selecting a Director, but shall have final authority in making the appointment.

(c) The Commission shall develop standards governing the provision of services under this Rule. The standards shall include:

- (1) Standards prescribing minimum experience, training, and other qualifications for appointed counsel;
- (2) Standards for appointed counsel caseloads;
- (3) Standards for the performance of appointed counsel;
- (4) Standards for the independent, competent, and efficient representation of clients whose cases present conflicts of interest, in both the trial and appellate courts;
- (5) Standards for providing and compensating experts and others who provide services related to legal representation;
- (6) Standards for qualifications and performance in capital cases; and
- (7) Standards for determining indigence and for assessing and collecting the costs of legal representation and related services.

In setting these standards the commission shall consider and mindful of the ABA Standards for Criminal Justice: Providing Defense Services; ABA Standards for Criminal Justice: Defense Function; ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases and any other recognized standards.

(d) The Commission shall determine the methods for delivering legal representation under this Rule other than the provision of counsel by a public defender. The Commission shall establish in each judicial district or combination of districts a system of appointed counsel, contract counsel, other methods for delivering counsel services, or any combination of these services.

(e) In determining the method of services to be provided in a particular judicial district, the Director shall consult with the bar association(s) and

judges of the district under consideration. The Commission shall adopt procedures ensuring that affected local bars have the opportunity to be significantly involved in determining the method or methods for delivering services in their districts. The Commission shall solicit written comments from the affected local bar and the presiding judge.

(f) The Commission shall establish policies and procedures with respect to the distribution of funds appropriated under this Rule, including schedules of allowable expenses, appointment and compensation of expert witnesses, investigators, interpreters, and other support services and procedures for applying for and receiving compensation.

(g) From time to time the Commission shall evaluate, study and make recommendations about the rates of compensation for appointed counsel, including the impact of rates on the availability of counsel both in terms of numbers and in terms of quality.

(h) The Commission shall approve and recommend to the General Assembly a budget for the Office.

(i) The Commission shall adopt such other rules and procedures as it deems necessary for the conduct of business by the Commission and the Office.

§7. Director of Tennessee Indigent Representation Services.

(a) The Director of Tennessee Indigent Representation Services shall be appointed by the Commission for a term of four years. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and

standards for the delivery of services under this Rule;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office;

(6) Apply for and accept on behalf of the Office any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Representation Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Rule and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs and assist in development of and promotion of continuing legal education programs for attorneys and others involved in the legal representation of persons subject to this Rule; and

(9) Perform other duties as the Commission may assign.

§8. Procedure for Appointment.

(a) Whenever a party to any case in Section 4(a) requests the appointment of counsel, the party, except in the case of a juvenile, shall be required to complete and submit to the court an Affidavit of Indigence Form provided by the Office.

(b) Upon inquiry, the court shall make a finding as to the indigence of the party pursuant to the provisions of Tennessee Code Annotated section 40-14-202, which finding shall be evidenced by a court order.

(c) If the court finds the party indigent, the court shall appoint the public defender subject to TCA section 8-14-201 et seq. If the public defender can not represent the party because of unavailability, conflict or otherwise, the court shall appoint counsel in accord with the plan established by the Office under Section 6.

(d) The appointment of the guardian ad litem under Section 4(a)(12) shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian.

(e) The child who is or may be the subject of proceedings to terminate parental rights under Section 4(a)(13) shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian.

§9. Procedure for Application for Related Services.

- (a) If the court finds a party indigent under Section 8(b), counsel may request reimbursement for services related to representation.
- (b) Such request shall be in a form and with such specificity as may be prescribed by the Office.
- (c) The request shall be made addressed to the Director who shall determine whether the request shall be granted.
- (d) The Commission shall by rule or regulation establish the standards for granting requests and rules for appeals from such determinations, which shall include appeal of the director's decision to the full commission.
- (e) The request for reimbursement, the decision of the director and the decision of the commission shall be filed under seal with the court in which the proceeding is being heard and shall become part of the record upon application for new trial or appeal.
- (f) Confidentiality. All requests for services, approvals of services, requests for payments of services, and payments for services provided pursuant to this Rule are deemed to be non-public records. All such information

shall be kept and remain confidential and privileged unless and until, it becomes pertinent to a disciplinary or malpractice proceeding.

§ 10 Rates and Maximum Amounts of Compensation for Legal Representation.

The following shall be the rates of compensation, expense reimbursement and maximum compensation to be allowed for legal representation.

- (a) The hourly rate for appointed counsel in non-capital cases is fifty dollars (\$50) per hour for time reasonably spent.
- (b) The maximum compensation allowed shall be determined by the original charge or allegations in the case. The compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the following amounts:
 - (1) Five hundred dollars (\$500) for:
 - (A) Cases in which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;
 - (B) Dependent or neglected child cases, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;
 - (C) Contempt of court cases where an adult or juvenile is in jeopardy of incarceration;
 - (D) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;
 - (E) Parole revocation proceedings pursuant to the authority of state and/or federal law;
 - (F) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
 - (G) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34;

(H) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors;

(I) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a);

(J) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;

(2) Seven hundred fifty dollars (\$750) for:

(A) Dependent or neglected child cases, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews and permanency hearings;

(B) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings;

(C) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.

- (3) One thousand dollars (\$1,000) for:
- (A) Preliminary hearings in general sessions and municipal courts in which an adult is charged with a felony;
 - (B) Cases in trial courts in which the defendant is charged with a felony;
 - (C) Direct and interlocutory appeals;
 - (D) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;
 - (E) Non-capital post-conviction and *habeas corpus* proceedings;
 - (F) Probation revocation proceedings;
 - (G) Cases in which a juvenile is charged with a non-capital felony;
 - (H) Proceedings against parents in which allegations against the parents could result in termination of parental rights;
 - (I) Guardian ad litem representation in termination of parental rights cases in accordance with section 1(d)(2)(D);
 - (J) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group in termination of parental rights cases;
 - (K) All other non-capital cases in which the indigent party has a statutory or constitutional right to be represented by counsel.
- (c) (1) An amount in excess of the maximum, may be sought by filing a request with the Office . The request shall include specific factual allegations demonstrating that the case is complex or extended in accordance with Tennessee Code Annotated section 40-14-207(a)
- (2) The Office shall enter a decision which evidences the action taken on the request. The following, while neither controlling nor exclusive, indicate the character of reasons that may support a complex or extended certification:
- (A) the case involved complex scientific evidence and/or expert testimony;
 - (B) the case involved multiple defendants and/or numerous witness;
 - (C) the case involved multiple protracted hearings;
 - (D) the case involved novel and complex legal issues.
- (3) Upon approval of the complex or extended claim the following maximum amounts apply:

- (A) One thousand dollars (\$1,000) in those categories of cases where the maximum compensation is otherwise five hundred dollars (\$500);
 - (B) One thousand five hundred dollars (\$1,500) in those categories of cases where the maximum compensation is otherwise seven hundred fifty dollars (\$750),
 - (C) Except as provided in section (2)(e)(3)(C), two thousand dollars (\$2,000) in those categories of cases where the maximum compensation is otherwise one thousand dollars (\$1,000);
 - (D) Three thousand dollars (\$3,000) in cases in trial courts in which the defendant is charged with a felony.
 - (E) The Office may waive the three thousand dollar (\$3,000) maximum if the request demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.
- (d) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the Office subject to the limitations of this rule, which limitations are declared to be reasonable. Compensation shall be limited to the two attorneys actually appointed in the case. Appointed counsel in a capital case shall submit to the Office interim claims for compensation. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the services were rendered.
- (e) Hourly rates for appointed counsel in capital cases shall be as follows :
- (1) Lead counsel--one hundred dollars (\$100);
 - (2) Co-counsel--eighty dollars (\$80);
 - (3) Post-conviction counsel--eighty dollars (\$80).
- (f) (1) Appointed counsel, shall be reimbursed for overhead expenses directly related to the representation of indigent parties at a rate of twenty dollars (\$20) per hour reasonably spent and reasonably necessary without limitation.
- (2) The following expenses for appointed counsel will be reimbursed without prior approval if reasonably necessary to the representation of the indigent party:

- (A) Mileage for travel within the state in accordance with Judicial Department travel regulations, if supported by a log showing the mileage, the purpose of the travel, and the origination and destination cities;
- (B) Lodging at actual costs, not to exceed the current authorized state rate (\$70), if supported by a receipt, where an overnight stay is required;
- (C) Meals in accordance with the Judicial Department travel regulations is supported by a receipt, where an overnight stay is required;

(g) Expenses not listed in section 10(f), including travel outside the state and copying expenses in excess of five hundred dollars (\$500), will be reimbursed only if prior authorization and prior approval is obtained from the director.

(h) The director is hereby authorized to reimburse the Department of Children's Services at the Judicial Department rate for the expense of transcripts in termination of parental rights appeals without obtaining prior approval by court order in each case.

EXHIBIT B - PROPOSED AMENDED RULE 13

§1. Right to counsel and procedure for appointment of counsel.

(a)(1) The purposes of this rule are:

- (i) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;
- (ii) to establish qualifications and provide for compensation of appointed counsel
- (iii) to provide for payment of expenses incident to appointed counsel's representation;
- (iv) to provide for the appointment and compensation of experts, investigators, and other support services for indigent parties in criminal cases, parental rights termination proceedings, dependency and neglect proceedings, delinquency proceedings and petitioners in post-conviction proceedings;
- (v) to establish procedures for review of claims for compensation and reimbursement of expenses; and
- (vi) to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

(2) The failure of any court to follow the provisions of this rule shall not *per se* constitute grounds for relief from a judgment of conviction or sentence. The failure of appointed counsel to meet the qualifications set forth in this rule shall not be deemed conclusive evidence that counsel did not provide effective assistance of counsel in a particular case.

(b) Each trial court exercising criminal jurisdiction shall maintain a roster of attorneys from which appointments will be made. However, a court may appoint attorneys whose names are not on the roster if necessary to obtain competent counsel according to the provisions of this rule.

(c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule.

(d)(1) In the following cases, and in all other cases required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.

- (A) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;
- (B) Contempt of court proceedings in which the defendant is in jeopardy of incarceration;
- (C) Proceedings initiated by a petition for *habeas corpus*, early release from incarceration, suspended sentence, or probation revocation;
- (D) Proceedings initiated by a petition for post-conviction relief, under Tennessee Code Annotated sections 40-30-201 et seq.;
- (E) Parole revocation proceedings pursuant to the authority of state and/or federal law;
- (F) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
- (G) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34; and
- (H) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for

abortions by minors.

(2) In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C) and (D) below, requests appointment of counsel.

(A) Cases in which a juvenile is charged with juvenile delinquency for committing an act that would be a misdemeanor or a felony if committed by an adult;

(B) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;

(C) Reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411. The court shall appoint a guardian ad litem for every child who is or may be the subject of such report. The appointment of the guardian ad litem shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(D) Proceedings to terminate parental rights. The court shall appoint a guardian ad litem for the child, unless the termination is uncontested. The child who is or may be the subject of proceedings to terminate parental rights shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(E) Cases in which a juvenile is charged in court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a).

(E)(1) Except in cases under Sections 1(d)(1)(F) Proceedings under the Mental Health Law, 1(d)(1)(G), proceedings for guardianship under Title 34 and 1(d)(2)(A), juvenile delinquency proceedings, whenever a party to any case in section 1(d) requests the appointment of counsel, the party shall be required to complete and submit to the court an Affidavit of Indigency Form provided by the Administrative Office of the Courts.

(2) Upon inquiry, the court shall make a finding as to the indigency of the party pursuant to the provisions of Tennessee Code Annotated section 40-14-202, which finding shall be evidenced by a court order.

(3) Upon finding a party indigent, the court shall enter an order appointing counsel unless the indigent party rejects the offer of appointment of counsel with an understanding of the legal consequences of the rejection.

(4) (A) When appointing counsel for an indigent defendant pursuant to section 1(e)(3), the court shall appoint the district public defender's office, the state post conviction defender's office, if qualified pursuant to this rule and no conflict of interest exists. Appointment of public

defenders shall be subject to the limitations of Tennessee Code Annotated sections 8-14-201 et seq.

(B) If a conflict of interest exists as provided in Tennessee Rules of Professional Conduct 1.7, the ABA Standards for Criminal Justice: Defense Function 4-3.5 or the public defender is not qualified pursuant to this rule, the court shall designate counsel from the roster of private attorneys maintained pursuant to section 1(b).

(C) The court shall appoint separate counsel for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown.

(D) The court shall not make an appointment if counsel informs the court that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards. Counsel should be guided by ABA Standards for Criminal Justice: Defense Function, the ABA Guidelines for Appointment and Performance in Death Penalty Cases and other recognized standards in making such a declaration.

(E) When the court appoints counsel pursuant to this subsection, the order of appointment shall assess the nonrefundable administrative fee provided by TCA § 37-1-126(c)(1) or § 40-14-103(b)(1). Additionally the court shall consider the financial ability of the indigent party to defray a portion or all of the cost for representation by the public defender or a portion or all of the costs associated with the provision of court appointed counsel as provided by TCA § 8-14-205(d)(1), § 37-1-126(c)(2) or § 40-14-103(b)(2). If the court finds the indigent party is financially able to defray a portion or all the cost of the indigent party's representation, the court shall enter an order directing the indigent party to pay into the registry of the clerk of such court such sum as the court determines the indigent party is able to pay as specified by TCA 40-14-202(e).

(5)(A) Appointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court under Tenn. Sup. Ct. R. 14 (setting out the procedure for withdrawal in the Court of Criminal Appeals) or Tennessee Rules of Professional Conduct 1.16

(B) For the purpose of determining when appointed counsel for the parents or the appointed Guardian ad Litem's obligations cease in Dependency and Neglect or Termination of Parental Rights proceedings in which the Tennessee Department of Children's Services initiates proceedings through the filing of a petition, the conclusion of the case occurs when:

- (1) An order dismissing the State's Petition is entered, or
- (2) When the minor child or children in question have been placed and the Department of Children's Services is no longer party to the action.

(f)(1) Indigent parties shall not have the right to select appointed counsel. If an indigent party refuses to accept the services of appointed counsel, such refusal shall be in writing and shall be signed by the indigent party in the presence of the court.

(2) The court shall acknowledge thereon the signature of the indigent party and make the written refusal a part of the record in the case. In addition, the court shall satisfy all other applicable constitutional and procedural requirements relating to waiver of the right to counsel. The indigent party may act pro se without the assistance or presence of counsel only after the court has fulfilled all lawful obligations relating to waiver of the right to counsel.

§ 2. Qualifications and compensation of counsel in non-capital cases.

- (a) (1) Appointed counsel, other than public defenders, shall be entitled to reasonable compensation for services rendered as provided in this rule. Reasonable compensation shall be determined by the court, in which services are rendered, subject to the limitations in this rule, which limitations are declared to be reasonable.
(2) These limitations apply to compensation for services rendered in each court: municipal, juvenile, general sessions; criminal, circuit, or chancery; Court of Appeals or Court of Criminal Appeals; Tennessee Supreme Court; and United States Supreme Court.
- (b) Co-counsel or associate attorneys shall be compensated subject to one cap per case.
- (c) The hourly rate for appointed counsel in non-capital cases is fifty dollars (\$50) per hour for time reasonably spent.
- (d) The maximum compensation allowed shall be determined by the original charge or allegations in the case. Except as provided in section 2(e), the compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the following amounts:
 - (1) Five hundred dollars (\$500) for:
 - (A) Cases in which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;
 - (B) Dependent or neglected child cases, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;
 - (C) Contempt of court cases where an adult or juvenile is in jeopardy of incarceration;
 - (D) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;
 - (E) Parole revocation proceedings pursuant to the authority of state and/or federal law;
 - (F) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
 - (G) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34;
 - (H) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors;
 - (I) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a);
 - (J) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who

is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;

(2) Seven hundred fifty dollars (\$750) for:

(A) Dependent or neglected child cases, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews and permanency hearings;

(B) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings;

(C) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.

(3) One thousand dollars (\$1,000) for:

(A) Preliminary hearings in general sessions and municipal courts in which an adult is charged with a felony;

(B) Cases in trial courts in which the defendant is charged with a felony;

(C) Direct and interlocutory appeals;

(D) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;

(E) Non-capital post-conviction and *habeas corpus* proceedings;

(F) Probation revocation proceedings;

(G) Cases in which a juvenile is charged with a non-capital felony;

(H) Proceedings against parents in which allegations against the parents could result in termination of parental rights;

(I) Guardian ad litem representation in termination of parental rights cases in accordance with section 1(d)(2)(D);

(J) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group in termination of parental rights cases;

(K) All other non-capital cases in which the indigent party has a statutory or constitutional right to be represented by counsel.

(e) (1) an amount in excess of the maximum, may be sought by filing a motion in the court in which representation is provided. The motion shall include specific factual allegations demonstrating that the case is complex or extended in accordance with Tennessee Code Annotated section 40-14-207(a)

(2) The court shall enter an order which evidences the action taken on the motion. The following, while neither controlling nor exclusive, indicate the character of reasons that may support a complex or extended certification:

(A) the case involved complex scientific evidence and/or expert testimony;

(B) the case involved multiple defendants and/or numerous witness;

(C) the case involved multiple protracted hearings;

(D) the case involved novel and complex legal issues. If the motion is granted, an order shall be forwarded to the Director of the Administrative Office of the Courts (herein "director") certifying the case as complex or extended. The order shall either recite the specific facts supporting the finding or incorporate by reference and attach the motion which includes the specific facts supporting the finding. To qualify for payment under this section, the order certifying the claim as extended or complex must be signed contemporaneously with the court's approval of the claim. *Nunc pro tunc* certification orders are not sufficient to support payment under this section.

(3) All payments under section 2(e)(1) must be submitted to the director for approval. If a payment under section 2(e)(1) is not approved by the director, the director shall transmit the claim to the chief justice for disposition.

(4) Upon approval of the complex or extended claim by the director or the chief justice, the following maximum amounts apply:

(A) One thousand dollars (\$1,000) in those categories of cases where the maximum compensation is otherwise five hundred dollars (\$500);

(B) One thousand five hundred dollars (\$1,500) in those categories of cases where the maximum compensation is otherwise seven hundred fifty dollars (\$750),

(C) Except as provided in section (2)(e)(3)(C), two thousand dollars (\$2,000) in those categories of cases where the maximum compensation is otherwise one thousand dollars (\$1,000);

(D) Three thousand dollars (\$3,000) in cases in trial courts in which the defendant is charged with a felony.

(E) The director or chief justice may waive the three thousand dollar (\$3,000) maximum if the order demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.

(f) Claims for compensation shall be submitted no later than 180 days after disposition of the case in each court in which representation is provided. Claims for compensation submitted after the 180-day period will be deemed waived and will not be paid.

(g) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

§ 3. Minimum qualifications and compensation of counsel in capital cases.

(a) For purposes of this rule, a capital case is a case in which a defendant has been charged with first-degree murder and until the District Attorney General declares, on the record, that the state will not seek the death penalty.

(b) (1) The court shall appoint two attorneys to represent a defendant in a capital case. Both attorneys appointed must be licensed in Tennessee or admitted under Tenn. Sup. Ct. Rule 19 (pro hac vice) and have significant experience in criminal trial practice. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel." Whenever possible, consistent with ABA Guidelines for Appointment and Performance in Death Penalty Cases, a public defender shall serve as and be designated "lead counsel."

(2) If the notice of intent to seek the death penalty is withdrawn or the District Attorney General declares, on the record, that the death penalty will not be sought, the trial court may enter an order relieving one of the attorneys

previously appointed subject to TRPC Rule 1.16 or Tenn. Sup. Ct. Rule 14.

(c) Counsel must:

- (1) be a member in good standing of the Tennessee bar or admitted under Tenn. Sup. Ct. Rule 19;
- (2) have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases
- (3) have regularly represented defendants in criminal jury trials for at least five years;
- (4) have demonstrated skill in:
 - (A) the use and challenges to mental health and forensic expert witnesses;
 - (B) the use of scientific and medical evidence including, but not limited to, mental health and pathology evidence; and
 - (C) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;
 - (D) in oral advocacy;
 - (E) familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology and DNA evidence;
 - (F) in the investigation, preparation and presentation of mitigating evidence; and
 - (G) the elements of trial advocacy, such as jury selection, cross-examination of witnesses and opening and closing statements.
- (5) in the twenty-four months preceding appointment, have completed a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(d) Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal, provided at least one trial attorney qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, determines that appointment of new counsel is necessary to provide the defendant with effective assistance of counsel or that the best interest of the defendant requires appointment of new counsel.

(e) If new counsel are appointed to represent the defendant on direct appeal, counsel must be members in good standing of the Tennessee Bar and maintain law offices in the state of Tennessee or admitted *pro hac vice* under Tenn. Sup. Ct. Rule 19.

(f) Appointed counsel on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals, familiarity with the practice and procedure of the appellate courts of the jurisdiction, have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases, and they must have at least one of the following qualifications: experience as counsel of record in the appeal of a capital case; or, experience as counsel of record in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

(g) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts, and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly

consent to continued representation.

(h) A prisoner who seeks relief from a conviction or sentence in a state trial or appellate court when the prisoner's execution is imminent is entitled to the representation of no more than two attorneys, at least one of whom is qualified as a post-conviction counsel as set forth in section 3(h). For purposes of this rule execution is imminent if the prisoner has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the conviction and sentence and the Tennessee Supreme Court has set an execution date.

(i) An attorney who seeks to be appointed as lead counsel or co-counsel in capital cases shall submit to the Administrative Office of the Courts a sworn application on a form prescribed by the Administrative Office of the Courts and approved by the Supreme Court. The application shall require the attorney to attach proof of his or her qualifications to the application.

(j) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the court in which such services are rendered, subject to the limitations of this rule, which limitations are declared to be reasonable. Compensation shall be limited to the two attorneys actually appointed in the case. Appointed counsel in a capital case shall submit to the Administrative Office of the Courts interim claims for compensation as approved by the court in which such services are rendered. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the claim is approved by the court in which the services were rendered.

(k) Hourly rates for appointed counsel in capital cases shall be as follows:

- (1) Lead counsel--one hundred dollars (\$100);
- (2) Co-counsel--eighty dollars (\$80);
- (3) Post-conviction counsel--eighty dollars (\$80).

(l) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

§ 4. Payment of expenses incident to representation.

(a) (1) Appointed counsel, shall be reimbursed for overhead expenses directly related to the representation of indigent parties at a rate of twenty dollars (\$20) per hour reasonably spent and reasonably necessary without limitation.

(2) The following expenses for appointed counsel, experts and investigators will be reimbursed without prior approval if reasonably necessary to the representation of the indigent party:

- (A) Mileage for travel within the state in accordance with Judicial Department travel regulations, if supported by a log showing the mileage, the purpose of the travel, and the origination and destination cities;
- (B) Lodging at actual costs, not to exceed the current authorized state rate (\$70), if supported by a receipt, where an overnight stay is required;
- (C) Meals in accordance with the Judicial Department travel regulations is supported by a receipt, where an overnight stay is required;

(b) Expenses not listed in section 4(2), including travel outside the state and copying expenses in excess of five hundred dollars (\$500), will be reimbursed only if prior authorization is obtained from the court in which the representation is rendered and prior approval is obtained from the director.

- (1) Authorization of expenses shall be sought by motion to the court.
- (2) The motion shall include both an itemized statement of the estimated or

anticipated costs and specific factual allegations demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party.

(3) The court shall enter an order that evidences the action taken on the motion. If the motion is granted, the order shall either recite the specific facts demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party or incorporate by reference and attach the defense motion that includes the specific facts demonstrating that finding.

(4) The order and any attachments shall be submitted to the director for prior approval before any expenses are incurred.

(c) The director is hereby authorized to reimburse the Department of Children's Services at the Judicial Department rate for the expense of transcripts in termination of parental rights appeals without obtaining prior approval by court order in each case.

§ 5. Experts, investigators, and other support services.

(a) At all critical stages of a criminal prosecution, in the trial and direct appeals of all criminal cases involving indigent parties, in the trial and direct appeals of post-conviction proceedings involving indigent petitioners, in trial and direct appeals of parental rights termination cases, in trial and direct appeals of dependency and neglect, and juvenile delinquency proceedings involving indigent petitioners, counsel, including public defenders, may seek investigative, expert, or other similar services.

(b) When requesting funding for expert or investigative services or other similar services, counsel may file *ex parte* the motion seeking such funding.

(1) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, and qualifications, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location, if known, at which the services are to be provided; and

(D) a statement of the anticipated itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(2) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) an itemized list of anticipated expenses for the investigation;

(C) the name and address of the person or entity proposed to provide the services; and

(D) a statement indicating whether the person satisfies the licensure requirement of this rule.

(3) If a motion satisfies these threshold requirements, the trial court must conduct an *ex parte* hearing on the motion.

(c) (1) Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

(2) Particularized need in the context of criminal trials and appeals is established when a defendant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial.

(3) Particularized need in the context of post-conviction proceedings is established when a petitioner shows by reference to the particular facts and

circumstances of the petitioner's case that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See TRPC 3.7

- (d) (1) The director and/or the chief justice shall maintain reasonable uniformity as to the rates paid individuals or entities for services provided to indigent parties, although not an exclusive listing, compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates:
 - (A) Accident Reconstruction \$115.00
 - (B) Medical Services/Doctors \$250.00
 - (C) Psychiatrists \$250.00
 - (D) Psychologists \$125.00
 - (E) Investigators (Guilt/Sentencing) \$50.00
 - (F) Mitigation Specialist \$65.00
 - (G) DNA Expert \$200.00
 - (H) Forensic Anthropologist \$125.00
 - (I) Ballistics Expert \$ 75.00
 - (J) Fingerprint Expert \$ 75.00
 - (K) Handwriting Expert \$ 75.00
- (2) Time spent traveling shall be compensated at no greater than fifty percent (50%) the approved hourly rate.
- (3) Investigators shall not be compensated unless licensed by the Private Investigation and Polygraph Commission of Tennessee, except when an investigator licensed in another state is authorized by a court in Tennessee to conduct an investigation in that other state.
- (4) Polygraph tests whose results are not admissible as evidence shall not be authorized or compensated.
- (e) (1) If the requirements of sections 5(c) and (d) are satisfied and the motion is granted, the authorization shall be evidenced by a signed order of the court. Unless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses under section 4(a).
- (2) The order shall include a finding and the specific facts that demonstrate particularized need as well as the information required by section 5(b)(1) or (b)(2).
- (3) The court may satisfy the requirements of this subsection by incorporating and attaching that portion of the defense motion that includes the specific facts supporting the finding of particularized need.
- (4) Once the services are authorized by the court in which the case is pending, the order and any attachments must be submitted to the director for prior approval.
- (5) If the director denies prior approval of the request, or the request exceeds five thousand dollars (\$5,000) per expert, or the hourly rate exceeds the presumptive rate in section 5(d)(1), the claim shall also be transmitted to the chief justice for disposition and prior approval.

§ 6. Review of claims for compensation and reimbursement of expenses.

- (a) (1) Claims for compensation and reimbursement shall be filed on approved forms with the Administrative Office of the Courts.
- (2) Time spent by counsel on a single case or single proceeding shall be included in a single claim for compensation.
- (3) Claims shall be supported by a copy of the court order appointing counsel or

authorizing the expenditure, by a copy of the approval of the director and/or the chief justice, where required, and by the certification of counsel that the services authorized by court order have been rendered.

- (4) Counsel will be held to a high degree of care in the keeping of records supporting all claims and in the application for payment. Failure to provide sufficient specificity in the claim or supporting documentation may constitute grounds for denial of the claim for compensation or reimbursement.
- (b) (1) The Administrative Office of the Courts shall examine and audit all claims for compensation and reimbursement to insure compliance with this rule and other statutory requirements.
- (2) After such examination and audit, and giving due consideration to state revenues, the director shall make a determination as to the compensation and/or reimbursement to be paid and cause payment to be issued in satisfaction thereof.
- (3) Payment may be made directly to the person, agency, or entity providing the services.
- (4) If the director denies, changes or otherwise modifies the order of the trial court approving the request of counsel for the indigent party, the director shall state the reason(s) for the denial, modification or change in writing. A copy of such denial, modification or change shall be sent to the counsel for the indigent party making the request. Counsel shall then have thirty (30) days to petition the chief justice for review of the action(s) of the director.
- (5) Confidentiality. All requests for services, approvals of services, requests for payments of services, and payments for services provided pursuant to this Rule are deemed to be non-public records. All such information shall be kept and remain confidential and privileged unless and until, it becomes pertinent to a disciplinary or malpractice proceeding.

§ 7 Spoken Foreign Language Interpreters and Translators –

- (a) The reasonable costs associated with an interpreter's and/or translator's services will be compensated when a trial court finds, upon motion of counsel, or sua sponte when counsel has not been appointed, that an indigent party has limited English proficiency ("LEP"). The term "interpret" refers to the process of transmitting the spoken word from one language to another. The term "translate" refers to the process of transmitting the written word from one language to another.
- (b) This section rather than Tennessee Rule of Criminal Procedure 28 applies when an indigent party requires the services of a spoken foreign language interpreter.
- (c) Compensation rates for spoken foreign language interpreters shall not exceed the following: Certified Interpreters - \$50 per hour; Registered Interpreters - \$40 per hour; Non-credentialed Interpreters - \$30 per hour. If the court finds that these rates are inadequate to secure the services of a qualified interpreter, the court shall make written findings regarding such inadequacy and determine a reasonable rate for a qualified interpreter.
- (d) Time spent traveling shall be compensated at no greater than fifty (50) percent of the approved hourly rate.
- (e) Mileage, lodging, meals, and parking expenses may be reimbursed as provided in Section 4(a)(2)(E).
- (f) The court shall determine if it is reasonably necessary for documents to be translated as part of assuring adequate representation of an indigent party with LEP. Document translation shall be compensated at no more than twenty (20) cents per word. If the court finds that these rates are inadequate to secure the services of a qualified translator, the court shall make written findings regarding such inadequacy and determine a reasonable per word translation rate.

(g) Claims for compensation of interpreters and translators shall be submitted to the Administrative Office of the Courts on forms provided by the Administrative Office of the Courts.